

No. 11,631

United States
Circuit Court of Appeals
For the Ninth Circuit

NATIONAL MOTOR BEARING CO., INC., A CORPORATION,
APPELLANT-PLAINTIFF,

v.

CHANSLOR & LYON CO., A CORPORATION,
APPELLEE-DEFENDANT.

APPELLANT'S REPLY BRIEF

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The following are the principal points relied on in Appellee's Brief in the order of their apparent importance as stressed in that brief:

1. That plaintiff had not commercialized Johnson's invention.
2. That Victor's accused seals were "on sale" and actually sold before Johnson filed his application.
3. That Johnson does not antedate the alleged sale of the Victor seals.
4. That defendant's Victor seals in issue do not infringe.

5. That this Court should not disturb the Findings of Fact of the District Court as to anticipation and lack of invention based on the five patents: Chandler, Fitzgerald, Gits, Heinze 2,071,403 and Winter.

6. That Johnson did not solve the "cold flow" problem.

7. That Gits and his patent No. 2,052,762 anticipate as well as the others named above.

8. That five other patents, making in all ten patents, should be considered on the questions of anticipation and of invention.

9. That Klein was the inventor, or at least a joint inventor with Johnson.

10. That plaintiff is barred by laches.

None of these ten points has any merit or constitutes a valid defense as we shall show.

I. Non-User by Plaintiff Should Not Defeat the Patent.

Although this point is not specifically relied on as in itself a defense, it is urged throughout the Appellee's brief as a reason for holding the Johnson patent in suit invalid or not infringed or not entitled to be enforced by the Courts.

That a valid patent is not to be denied enforcement by the Courts has been a fundamental principle in our patent system. *Paper Bag Patent Case*, 210 U.S. 405, 422-430, and many other cases to the same effect.

In fact, it would wreck our patent system if Courts should deny enforcement to patents which their owners had not put into commercial practice. **There is no such provision in the statutes or in the authorities.**

If a patent were denied enforcement on this ground, a great number of applications for patents would not be

filed and a great many patents would not be issued, but would be kept as trade secrets thereby defeating the very object of our patent system, which is to encourage inventors to disclose to the public their new ideas for which in return they receive a monopoly, namely the right to exclude others for the term of 17 years. *Bloomer v. McQuewan*, 14 How. 539.

The non-user as yet by the plaintiff of Johnson's invention is therefore no ground for refusing the relief herein asked for or for creating a prejudice against the patent designed to obscure and even obliterate the significant differences between the patent and the prior art, which differences are common both to the patent and to the defendant's Victor seals.

Non-user of a plaintiff's patent is pertinent only when the practicability of the patented thing is in doubt. Here this is not the case. No such attack is made on the patent. The success of the accused Victor seals, being close copies of the seals of the Johnson patent, is a conclusive answer to such an attack.

The Victor Co. has no reason to complain because the plaintiff did not choose to enter the market in competition with Victor to the injury of Victor's business in the infringing seals.

II. No Victor Type A or H Seals Were in Existence Before Johnson's Filing Date, August 5, 1936.

Appellee's Brief, pp. 19-25, lays great stress on the assertion typified by the statement at p. 25: "The accused seals were offered for sale and some of the Type A seals were actually sold in July 1936 (R. pp. 189-195, 768-770)". The same statement in different forms is reiterated through the brief.

It is not true. None of the accused types of seals were in existence in July 1936 and therefore none were offered for sale and none were sold in that month.

The only testimony as to Victor's sales is given by Aukers, Victor's development and production engineer. There was no testimony on this point by Gammie, Victor's sales manager, who followed Aukers to the stand (p. 199). There was no contemporaneous record evidence except the Quotation and Selling Records (pp. 768-769) and a Bulletin gotten out for salesmen (p. 770).

The Quotation and Selling Records show that Type A seals in quantities of 25 to 500 were quoted to the Spicer Co. on June 30, 1936 and an order for 25 was received July 9, 1936. But **there is no record of their manufacture or delivery. There is no testimony whatever when these Type A seals were manufactured or delivered or that they were ever made and delivered.** As the burden is heavily on the Appellee to show the facts of alleged anticipation, the absence of any proof of manufacture or delivery, which could easily have been produced, if it existed, as by Gammie for example, may be taken as showing that there was none, or at least that the dates of manufacture and delivery were after August 5, 1936, Johnson's filing date.

The Quotation and Selling Records also show that 50 Type H seals were ordered by the Richard Wilcox Manufacturing Co. on November 30, 1936. As this is later than Johnson's date of August 5, 1936, this transaction is wholly immaterial. But even as to these seals, there is no record of delivery and Aukers testified that he did not know when they were delivered (p. 191).

The Bulletin Defendant's Exhibit AAH (p. 770) shows the "Standard Constructions of Victor Synthetic Seals." It is marked on the bottom "supersedes all prints prior to July 29, 1936." Even accepting that statement, it is no

record proof of the date of this bulletin but only that it was produced some time after July 29, 1936. Aukers merely says the bulletins were given out to salesmen and some good customers "at that time" (p. 194). But this is merely his recollection without any record to back it up and is too vague to prove the date. Aukers testified that this bulletin shows **"the types of seals as designed"** (p. 190). **He did not say as made or ready for delivery.** Auker's testimony that the second sheet of the bulletin gives "the type of the seals available at that time for which tools were made" means only that the tools were ready to make the seals if ordered. It does not prove that the seals had been manufactured. For instance, the seals ordered by the Wilcox Co. had the number SDM-191 on page 2 of the bulletin, but were not ordered until November 30, 1936 (p. 191).

The quotations to Spicer and Wilcox were merely offers to make the seals if the customer would order them.

Aukers testified that in June of 1936 the Victor Co. made the tools for making Type A, and that in the middle of July, 1936, it completed the tools for the Type H (p. 191). He does not say that any seals were made at that time.

He also said that in 1936 he had "the job of testing all the oil seals as made from all the tools." He says that the tests were "all made before he made any sales" (p. 192), but there is no corroboration of this. There is nothing to show what the tests were, or how they were made, or whether they were successful or not, or when the tests were made and completed.

There is no evidence of who made the invention embodied in either of the Victor Type A or Type H seals.

There is no evidence that any such Victor seals were in existence or on sale by the Victor Co. before August 5, 1936.

The conclusion is inevitable that the Victor Type A and Type H seals were not sold or "on sale" prior to Johnson's filing date. *B. F. Sturtevant Co. v. Massachusetts Hair & Felt Co.*, 124 F.(2) 95, 97 (1941) (C.C.A. 1); *Trabon Engineering Corp. v. Dirkes*, 136 F.(2) 24, 28 (1943) (C.C.A. 6); *M'Creery Engineering Co. v. Massachusetts Fan Co.*, 195 Fed. 498, 500, 501 (1912) (C.C.A. 1); *Burke Electric Co. v. Independent Pneumatic Tool Co.*, 234 Fed. 93 (1916) (C.C.A. 2); *Walker on Patents* (Deller Ed.) Vol. 1, p. 355.

Johnson's filing date of August 5, 1936 stands as the date of his constructive reduction to practice and is ahead of any proven date of the manufacture, much less the sale, of either of the Type A or the Type H Victor seals here in issue. **Therefore Appellee's entire defense structure, based on the alleged selling of the Victor types A and H seals prior to Johnson's filing date, is shown on Appellee's own testimony to be absolutely without foundation.**

III. Johnson's Dates Are Earlier Than Any Dates Which Can Be Ascribed to the Victor Type Seals in Issue.

To summarize:

The sketch Exhibit 20 (p. 532), is dated May 23, 1935.

The assembly drawing, Exhibit 23 (p. 533), is dated August 13, 1935.

A seal, Exhibit 21, made from this drawing and known as "Metal Heel Hermetik," was adequately tested from September 9 to October 7, 1935 (pp. 235, 401). On the back of the tag on the Exhibit 21 seal it says "Metal Heel Hermetik subjected to continuous testing from 9-9-35 to 10-7-35" (p. 235). The drawings and the tag are contemporaneous proof. The tests were on the regular stand-

ard testing machine and showed that the seal was very satisfactory (pp. 241, 402). Such tests are the same as those used by the Victor Co. (p. 192). The tests simulated actual service conditions with sufficient clearness to make it certain that the device would perform its intended function in actual service (p. 402). The tests were a demonstration in fact as contradistinguished from one in theory (p. 267). Johnson and Klein agree that the tests lasted about a month. Appellee's brief (p. 24) cites Johnson's testimony that they lasted 72 hours which Johnson corrected on the next page (p. 269). The seal was a complete actual reduction to practice.

Johnson swore to his application on July 29, 1936 (p. 608).

The application was filed August 5, 1936.

There is no contradiction as to any of the above facts.

There are no dates for the Victor seals, which are respectively earlier than Johnson's dates. He was the first inventor.

IV. Defendant's Seals, Shown on Pages 10 and 11 of Appellant's Opening Brief and in the Upper Line on Page 15 of That Brief, Infringe.

The Appellee's only argument on non-infringement is that it was not proved that defendant's seals have been used in places where "protection from wear by contact with adjacent moving parts" is achieved. But that is immaterial because the seals are constructed to achieve such protection if and when they were used in an assembly where such protection is necessary.

The "adjacent moving parts" are not an element of the claim and appellee does not contend that they are. The cases which Appellee cites (pp. 19, 20 of its brief) relate

to functional whereby clauses. The cases are to the point that if the elements or parts in a defendant's device, alleged to correspond to those specified in a claim, do not perform the cooperative function of the claimed elements, they are not the same or the equivalent of the elements of the claim. This is no more than the familiar rule of patent law that equivalency is tested by the functions of the parts in question and if they perform the same functions they are the same or equivalent and if they do not they are not the same or equivalent. The rule is stated in *Machine Co. v. Murphy*, 97 U.S. 120 at p. 125:

“Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.”

The “whereby clause” of the Johnson claim is a statement of the result to be achieved when the seal is used where there may be adjacent moving parts as explained by Johnson (p. 285). As to a similar whereby clause in a patent claim Judge Hough in *Electro-Dynamic Co. v. Westinghouse Co.*, 191 Fed. 506 C.C.S.D. N.Y., said p. 508:

“That this ‘Whereby clause’ adds nothing to the claim is fundamental. It is a statement of asserted result, not of method or means of reaching it; and in this instance it is but a repetition of the stated ‘object of my invention’ with which the application begins, a sort of q.e.d. triumphantly affixed to the asserted solution of the problem.”

For a full discussion of the different sorts of whereby clauses, see 21 *Georgetown Law Journal*, pp. 291-305, in an article by the well known authority on patents, Leon H. Amdur.

The claim of the Johnson patent is for “an oil seal” having two elements (1) “a cup member” and (2) “a molded resilient sealing member.”

(1) The cup member has two features, “a peripheral portion” and “an axially inwardly offset radial flange.”

The “peripheral portion” has two functions; first to enclose the other parts of the seal and second to bear against the surrounding bore and form an oil-tight fit therewith.

The “flange” has two functions, first, it extends axially beyond the sealing member to protect it from adjacent moving parts and, second, it is the sole supporting and holding means for the sealing member.

(2) The “sealing member” has annular portions or lips on each side of the flange and tie portions extending through the holes in the flange bonding the lips together. Thus the sealing member performs the functions, first, of embracing both sides of the flange, second, of being bonded to both sides of the flange by cement and by the tie parts extending through the holes of the flange, and third, of making an oil-tight engagement with the shaft.

The defendant’s Victor oil seals, as shown in the chart Ex. 10, p. 521, have the same combination of both of these

elements of the claim, which perform the above named functions and are combined in the same way to provide the same mode of operation and to accomplish the same result. The Victor seals therefore infringe.

It is significant that Appellee's Brief (p. 30) admits that the Victor Co. "took out some improvement patents," obviously referring to Heinze et al. No. 2,240,332 (p. 539) showing the Victor Type H seal. Subordination of these seals to Johnson's invention as an embodiment thereof seems thus to be conceded.

V. The Findings of Facts of the District Court Are Not Conclusive.

Findings of Fact V and VI, p. 57, on which appellee relies, are that "the alleged invention and improvement claimed in the Johnson patent" were disclosed in various prior patents, including the five named specifically. And the Conclusions of Law are that the claim of the Johnson patent is invalid for lack of novelty and for lack of invention."

Appellee contends that the Findings of Fact should not be set aside "unless clearly erroneous" under Rule 52a of the Rules of Civil Procedure. Appellee does not contend that the Conclusions of Law to the same effect are subject to the same Rule.

The Findings of Fact are based on the Court's interpretation of Johnson's claim. That question is one of law. *Coupe v. Royer*, 155 U.S. 565.

The Findings of Fact are based, therefore, on a matter of law and are not true findings of fact. The District Court did not find in what way the seals of the prior patents met Johnson's claim. He made no findings of fact comparing the seal construction of Johnson with the sev-

eral seal constructions of the prior patents and he made no attempt to show that Johnson's construction is the same as or similar to that of any of the prior patents.

The Court's Findings of Fact are really Conclusions of Law because they are based on the Court's interpretation of Johnson's claim. The Findings to have been "of Fact" should have been limited to the facts of the several constructions of the patents. Had they been so limited they would have been "clearly erroneous."

VI. Cold Flow in Johnson and Victor Does Not Cause Leakage.

Appellee's brief begs the question of "cold flow" by setting up a man of straw.

Johnson did not prevent the cold flow of rubber-like synthetic materials* but he was the first to discover how such materials could be used in an oil seal without the loosening of the synthetic sealing member in its attachment to the cup member and thereby without leakage of oil between the sealing member and the cup member.

In Johnson and in the Victor seals the sealing member is attached to a single piece of metal, the annular flange, and is under no pressure at the place of attachment. Therefore there is no cold flow or relative movement between the sealing member and the flange and the seal remains oil-tight.

Any such sealing member is subject to cold flow at the place where there is pressure, as by the garter spring. Such cold flow is typified by the slight distortion of the sealing member axially in plaintiff's Exhibit 21 but this does not affect the oil-tightness of the attachment of the sealing member to the flange, which prevents leaks.

*A set or loss of resiliency or recovery, something like the flowing of putty when squeezed between the fingers (p. 463).

When Appellee's brief, p. 8, argues that the Johnson sealing member has cold flow because it may have such axial distortion, it is confusing the matter. The cold flow, which it is essential to avoid, and was avoided by Johnson, is the cold flow of the material which would loosen its attachment to the cup and cause leakage. This did occur in Gits and was inevitable in all seals in which a synthetic sealing member is held by a clamp.

The claim of the Johnson patent specifies that the sealing member is bonded to both sides of the flange. This is accomplished by cement and by the ties of the material extending through the holes in the flange. **The claim thus excludes the oil seals of the prior art, namely Gits and others, in which the sealing member is clamped, as in a vise, between holding members or rings which press against it on both sides.**

VII. Gits and His Patent Do Not Anticipate—"The Damn Things Leaked."

Appellee's brief bases its greatest reliance on Gits. But Gits does not disclose or suggest Johnson's invention.

In the Gits construction (p. 701), there is a housing 1 which has an inward radial flange 2 which is bent axially. This is the only resemblance which the Gits construction has to the Johnson seal.

In Gits there is a clamping member 11 which is expanded to clamp the sealing or packing member between it and the inner rim of the clamping portion 6 of the housing. The Gits patent states, page 1, col. 2, line 51:

"A clamping member comprising an annular ductile ring 11 is utilized to secure the packing member to the flange of the shell or housing 1."

On page 2, col. 1, line 14, the Gits patent states:

“The clamping ring 11 is then swedged or rolled, or otherwise suitably expanded outwardly, so as to embed itself in the clamping portion 6 of the packing member and securely clamp the same against the edge of the outside portion 4 of the flange 2.”

There is no flange on the housing of Gits which performs the function of the flange of the Johnson patent and claim because the Gits flange is not the sole support of the sealing member. The Gits sealing member is not the same as the sealing member of Johnson because it does not embrace the flange and is not bonded to both sides of the flange. **On the contrary, the sealing member of Gits is clamped between the flange and the expanded clamping ring. The compression is all that holds it** (Gits, p. 330).

This construction was found, in the tests of the Gits device with a sealing member of synthetic material, to be a failure. Tarbox testified (p. 398), “The final test on them showed they were not satisfactory.” The pressure of the clamps caused the sealing member, when hot, to flow (Gits, p. 329). It became loose in its clamp and permitted the leakage of oil. **“The damn things leaked”** as Haushalter, who had been the Development Engineer in the New Products Department of the B. F. Goodrich Rubber Co., testified (p. 381). On the testing fixture in the Gits plant the seal leaked as Gits admitted (p. 317).

Only experimental seals with sealing members of synthetic material were given out, i.e., those to the Spicer Co. They were failures and abandoned (Gits, p. 317). But 74,000 Gits seals with leather sealing members were sold to Spicer (p. 308).

The Gits history demonstrates that there was before Johnson a strong demand for an oil seal with a synthetic sealing member (Haushalter, p. 369) which presented the problem of leaking. Neither Gits nor any one else before Johnson solved that problem.

The four patents, relied on by the District Court and by Appellee in addition to Gits, are Chandler, Fitzgerald, Heinze and Winter, which with Gits are shown on page 15 of our Opening Brief.

No one of them has any feature pertinent to Johnson which is not disclosed by Gits. In each of them the sealing member is clamped on each side by the case members. Like Gits, each of them lacks an annular flange on the cup member, which is the sole support for the sealing member. Each lacks a sealing member, which embraces both sides of the flange and is bonded to both sides of the flange. These patents, like Gits, therefore fail to anticipate or suggest the Johnson invention.

VIII. The Other Patents Cited by Appellee Are Irrelevant.

Appellee's brief, p. 16, cites five other patents to show "several ways," besides clamping, for securing the sealing member to the cup member. No one of these is the way employed by Johnson and by Victor in the infringing seals.

In Peterson, No. 2,114,908 (p. 724), the sealing member is cemented on one side only, either to the outside housing or to an inside ring. Although issued to the Victor Co., it was never used (Aukers, p. 231).

Penick, No. 1,817,095 (p. 660), was a file wrapper reference. It shows a "Pump Packing." It has no casing or cup member and therefore no flange on a cup member,

which is embraced on both sides by a sealing member which is bonded to it on both sides. The Patent Office conceded that Penick did not disclose Johnson's invention.

The Lord patent, No. 1,996,210 (p. 675), shows a "Joint" in a motor mounting. It is not an oil seal and lacks the casing or cup member of an oil seal and the sealing member. It is in a different art and would have to be reconstructed to convert it into an oil seal as Aukers admitted (p. 230).

The Walker patent, No. 2,028,635 (p. 747), is for a "Fluid Pump Packing." It is as irrelevant as Penick.

The Miller patent, No. 2,004,669 (p. 692), shows a piston "Packing Cup" in which the packing ring is cemented to a disc on the piston. It is like Penick and has no resemblance to Johnson (p. 250).

These five additional patents add nothing pertinent to what is shown by Gits and the other four patents on which the District Court relied.

The drawing of Gits opposite page 14 of Appellee's Brief and the text of the Brief are both significant because they fail to assert that the sealing member of Gits is bonded to both sides of the radial flange. It is not so bonded (p. 353). The Brief (p. 14) admits that "other prior art patents" referred to on that page do not meet Johnson's claim because they also lack the "limitation that the sealing element be secured to 'both sides of' the radial flange." And the Brief also admits (p. 15) that the prior patents thereafter referred to on page 16 also lack the same "limitation." The combination of elements to which Johnson's claim is limited is thus conceded to be new.

To summarize:

No patent in the prior art discloses an oil seal, as described and claimed by Johnson and as typified by the infringing Victor seals, having in combination:

a cup member having a peripheral portion which makes an oil-tight fit with the bore of the housing and a radial flange which is the sole support of the sealing member and is offset axially to protect the molded material from contact with adjacent moving parts and

a sealing member which embraces both sides of the flange and is bonded to both sides of the flange (specifically by cement and by the tie pieces of the material of the sealing member which extend through perforations in the flange).

This oil seal construction was new with Johnson. It provides a new mode of operation, namely, the anchoring of the sealing member to the cup member without pressure on the sealing member. It secures a new result, essential to the use of a sealing member of rubber-like composition material which is subject to cold flow, namely, the prevention of loosening of the sealing member, thereby preventing leaks.

IX. Klein Not an Inventor—Either Sole or With Johnson.

Klein was in charge of fabricating and testing new devices at the plaintiff's plant. His sole contribution to the Johnson seal was devising a mechanical method for molding the sealing member to the flange. The Appellee in its brief, p. 35, gives only a fragment of Klein's testimony, which taken by itself is misleading.

Mr. Klein makes the matter clear on pp. 440-443:

“Q. I want to clear up, Mr. Klein, in what sense you used the word ‘imagining’ and ‘imagination.’ I want to read to you the claim from the Johnson Patent, and ask you whether you or Mr. L. A. Johnson thought of these different things.

Who thought of using 'a cup member having peripheral portion an axially inwardly offset radial flange'?

A. That was Mr. Johnson.

* * * * *

Q. What elements did you conceive and what elements did Mr. Johnson conceive?

A. My contribution to the thing was the bonding of the element to the case to make a two-piece oil seal out of it.

Q. You mean in the manufacturing of it?

A. That is right.

Q. In making it?

A. Yes.

* * * * *

Q. Who thought of having the molded resilient sealing member bonded to both sides of the radial flange at the offset 'so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset'?

A. That was Mr. Johnson.

Q. That was his idea?

A. That is right.

Q. Well, then, in what sense did you use the word when you said that in the preparation of your sketch, Exhibit 20, some of your imaginings went into that sketch?

A. That can be illustrated by this sketch of the mold here on this—what do you call it? Exhibit—

Q. Exhibit 20.

A. On Exhibit 20 I show here a section of the mold positioned into the case and contoured like the sealing element as an illustration of how this seal could be molded with two pieces plus a spring—in two pieces plus the garter type spring.

Q. Then as I understand it, your imagination went into the fabrication of it?

A. That is right.

Q. The way of making it?

A. That is right.

* * * * *

XQ. Counsel for plaintiff asked you regarding certain elements. Now, I wish you would tell us without the patent claim before you what elements you presented and what elements Mr. Johnson presented? Just tell us.

A. We were working on the development of the simplest possible type of synthetic oil seal with the least possible number of parts and the lowest possible manufacturing cost.

In connection with that the outer case was suggested by Mr. Johnson and the bonding of the material to the case was presented by myself and illustrated in this sketch, Exhibit 20.

In addition to the contouring of the seal I sketched a cross-section, a small portion of the cross-section of the mold, pointing out the advantages of such a seal and showing how it could be molded. That just about covers it.

XQ. Now, what do you mean by 'bonded'? That was your idea. What did you mean by 'bonded'?

A. It would be a mechanical application to the metal part.

XQ. And you used cement for bonding as you made this, is that right?

A. That is right.

XQ. And that bonding idea was yours?

A. The application of the material to the steel was mine. The application of synthetic material to the steel was mine. That is, the mechanics of the thing was mine. [64]

XQ. The outer case was Johnson's idea?

A. That is right.

XQ. Whose idea was it of having an offset flange?

A. Mr. Johnson's."

Mr. Johnson, referring to a drawing, Exhibit 20, p. 532, made by Klein, testified (p. 232):

“Q. Did you have anything to do with the making of that drawing?

A. Yes.

Q. What did you have to do with it?

A. I had previously made a sketch of this seal in question and instructed Mr. Klein to make a sketch of it, and then supervised the testing of the seal.”

The testimony of both Klein and Johnson shows that Johnson was the sole inventor of the seal and that Klein was simply called in by him to make a sketch and to devise the mold and the mechanical means for fabricating the seal. Johnson had made the invention before he called in Klein.

Under such circumstances Klein is not either the sole inventor or a joint inventor of the invention. *Agawam Co. v. Jordan*, 7 Wall. (74 U.S.) 583, 602, 603 and 606.

X. Appellant Has Not Been Guilty of Laches.

Appellee's brief makes only one comment that requires an answer. It complains that the plaintiff did not notify the Chanslor & Lyon Co. of the patent and its infringement. It is sufficient that the plaintiff did notify the Victor Co. It was unnecessary and would not have been commendable to threaten the Victor Co.'s customers since the manufacturer itself had been put on notice.

Moreover, this suit was brought within the six year statutory period and therefore there was no laches. *Craftint Mfg. Co. v. Baker*, 94 F.(2) 369, 374 (C.C.A. 9).

Furthermore, even if there were laches it would not be a valid reason for refusing a decree sustaining the patent and ordering an injunction. *McLean v. Fleming*, 96 U.S. 245, 253, 257; *Menendez v. Holt*, 128 U.S. 514, 524, 525.

Conclusion

For the foregoing reasons and for those given in Appellant's Opening Brief the Johnson patent should be held valid and infringed and an appropriate decree ordered.

Respectfully submitted,

A. DONHAM OWEN,

Counsel for Appellant-Plaintiff.